

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of the)

Pay Telephone Reclassification)

and Compensation Provisions of the)

Telecommunications Act of 1996)

CC Docket No. 96-128

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REPLY TO BELLSOUTH OPPOSITION TO
APPLICATION FOR REVIEW
OF EXCEL TELECOMMUNICATIONS, INC.

In its Applications for Review and reversal of the Common Carrier Bureau's ("Bureau") waiver orders on April 4, 1997 ("First Waiver Order") and April 15, 1997 ("Second Waiver Order") in the referenced Docket, Excel Telecommunications, Inc. ("Excel") requests reversal of the waiver orders on the ground that these waivers contradict the mandate of § 276 of the 1996 Telecommunications Act (the "1996 Act"), as interpreted by the Commission in its Payphone Order and its Reconsideration Order.¹ In the Reconsideration Order the Commission summarized the necessary prerequisites that a local exchange carrier ("LEC") must satisfy before it is entitled to interim compensation from interexchange carriers ("IXCs") under the Payphone Order.²

In the First Waiver Order the Bureau relieved the LECs from the obligation to have effective interstate tariffs removing certain subsidies and excessive costs by April 15, 1997. In the Second

¹ Order on Reconsideration in Docket 96-128, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, FCC 96-128 (rel. Nov. 8, 1996) ("Reconsideration Order").

² Reconsideration Order at ¶131.

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Waiver Order the Commission relieved the LECs of the obligation to file and have approved intrastate tariffs that meet the “new services” test before receiving interim compensation. Under this test, the LECs must provide with their tariff filings cost data sufficient to establish that a new service or restructured unbundled service elements will not recover more than a reasonable portion of the carrier’s overhead. See 47 C.F.R. § 61.49(g)(2).

Although the Bureau concedes that “the individual BOCs are not in full compliance with the requirements of the Payphone Reclassification Proceeding,³ it was persuaded to grant waivers based upon extensive ex parte communications with the RBOC coalition, the Bureau granted these waivers even though it recognized that the Commission’s conclusion “that state and federal tariffing of both the payphone unbundled features and functions provided to others and the unbundled features and functions provided by the LEC to its own payphone operations must be tariffed to avoid possible subsidies and discrimination.” First Waiver Order at ¶15.

As Excel argued in its applications, the Bureau’s waivers exceeded the delegation of its authority, granted by the Commission “to determine whether a LEC has met the requirements of the Payphone Reclassification Proceeding prior to receiving compensation.” Second Waiver Order at 3. Rather than respond to Excel’s Applications for Review directly, BellSouth, the only LEC opposing Excel’s applications, launches a diatribe attacking the lawfulness of the Commission’s Payphone Order and Reconsideration Order. BellSouth argues that the Bureau has rescued the Commission, curing the defects of its earlier orders.

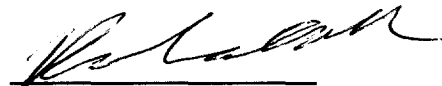
³ First Waiver Order at ¶20; Second Waiver Order at ¶18.

Although BellSouth's position is wrong on the merits, it is also irrelevant. BellSouth's arguments are no more than a prohibited collateral attack on the Commission's Payphone Order and Reconsideration Order. BellSouth failed to appeal the Commission's orders on the ground that the Commission unlawfully conditioned interim compensation on the LEC's fulfillment of express conditions, including "the filing of effective intrastate tariffs reflecting the removal of charges that cover the costs of payphones and any intrastate subsidies and for basic payphone services (for dumb and smart payphones" and "intrastate... [] tariffs for unbundled functionalities associated with these lines." First Waiver Order at 6. It may not raise these issues here. In re Home Box Office and Twentieth Century Fox Film Corp., 51 F.C.C.2d 317 (Feb. 19, 1975); In Re Application of MCI Communications Corp., 10 F.C.C. Rcd 1072 (Dec. 28, 1994); In Re Eli and Harry Daniels, 62 F.C.C.2d 218 (Dec. 30, 1976). The Commission should not accept BellSouth's invitation to revisit its decision in the Payphone Order.

Moreover, as BellSouth concedes, the Commission has statutory jurisdiction, pursuant to § 276, to assure that LECs do not include anticompetitive subsidies in intrastate tariffs. See BellSouth Opposition at 5. Requiring LECs to supply cost data with intrastate tariff filings (the gravamen of the "new services" test) is well within this jurisdiction. Indeed, it is the only check that will permit the Commission to assure that LECs have fulfilled statutory requirements and that will permit the Commission to fulfill its mandate to "promote competition among payphone providers and promote the widespread deployment of payphone services to the benefit of the general public..." (47 U.S.C. § 276(b)) and to safeguard against discrimination (47 U.S.C. § 276(a)). Moreover, as Congress expressly provided, the FCC's regulations implementing the payphone provisions of the 1996 Act preempt inconsistent state requirements. 47 U.S.C. § 276(c).

For these reasons, and those set forth in Excel's Applications for Review, the FCC should rescind the First and Second Waiver Orders as contrary to the safeguards necessary to assure compliance with the 1996 Act prior to entitlement to interim compensation, as adopted by the Commission in its Payphone Order and Reconsideration Order. The Commission should further find that the Bureau exceeded its authority in failing to assure the LECs full compliance with these orders before they receive interim compensation.

Respectfully submitted,



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Dated: June 4, 1997

CERTIFICATE OF SERVICE

I, Jeannine Allen, hereby certify that on this 4th day of June, 1997, a copy of the foregoing **Reply to BellSouth Opposition to Application for Review of Excel Telecommunications, Inc., CC Docket No. 96-128**, was served on each of the following parties via courier, or by first-class mail, postage prepaid (as denoted by asterisk):

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